

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
)
UNITED COMMUNICATIONS SYSTEMS,)
INC., d/b/a CALL ONE)
) 03-0772
Petition for arbitration of an)
interconnection agreement with)
Illinois Bell Telephone Company)
pursuant to Section 252(b) of)
the Telecommunications Act of 1996)

Chicago, Illinois
March 19, 2004

Met, pursuant to notice at 10:30 a.m.

BEFORE:

Mr. Glennon Dolan, Administrative Law Judge.

APPEARANCES:

MANDELL, MENKES & SURDYK by
MR. BRUCE N. MENKES
333 West Wacker Drive
Chicago, IL 60606

-and-

SWIDLER, BERLIN, SHEREFF, FRIEDMAN
MR. ERIC BRANFMAN (telephonically)
3000 K Street N.W.
Washington, D.C., 20007
for the petitioner;

1 APPEARANCES: (Continued)

2 MS. NANCY J. HERTEL
3 225 West Randolph Street, Suite 25D
4 Chicago, IL 60606
5 -and-
6 MAYER, BROWN, ROWE & MAW by
7 MS. ANGELA O'BRIEN
8 190 South LaSalle Street
9 Chicago, IL 60603
10 for SBC;

11
12
13
14
15
16
17 SULLIVAN REPORTING COMPANY, by
18 MICHAEL R. URBANSKI, C.S.R.,
19 License No. 084-003270
20
21
22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I N D E X

Witnesses: Direct Cross Re- Re- By
 direct cross Examiner

APPLICANT'S E X H I B I T S
 For Identification In Evidence

1 JUDGE DOLAN: By the power and authority of
2 the Illinois Commerce Commission Commission I
3 call Case No. 03-0772, United Communications
4 Systems, Incorporated, doing business as Call
5 One, a petition for arbitration of an
6 interconnection agreement with Illinois Bell
7 Telephone Company doing business as SBC Illinois
8 pursuant to Section 252(b) of the
9 Telecommunications Act of 1996 to order.

10 Would the parties please identify
11 themselves for the record.

12 MR. MENKES: Bruce Menkes, M-e-n-k-e-s, 333
13 West Wacker, Chicago, Illinois, on behalf of
14 United Communications Systems, Inc., and Eric
15 Branfman also on behalf of United Communications
16 Systems, Inc.

17 MS. O'BRIEN: On behalf of SBC Illinois,
18 Angela D. O'Brien of the law firm of Mayer,
19 Brown, Rowe and Maw, LLP, 190 South LaSalle,
20 Chicago, Illinois, 60603.

21 MS. HERTEL: Also appearing on behalf of SBC
22 Illinois, Nancy Hertel, H-e-r-t-e-l, 225 West

1 Randolph, 25-D, Chicago, Illinois, 60606.

2 MR. LANNON: And appearing on behalf of the
3 staff of the Illinois Commerce Commission,
4 Michael Lannon, L-a-n-n-o-n, and Brandy Brown,
5 160 North LaSalle Street, Suite C-800, Chicago,
6 Illinois, 60601.

7 JUDGE DOLAN: Let the record reflect no other
8 appearances for the record.

9 All right. I see at least four issues
10 to deal with today.

11 We have UCS's motion to compel, UCS's
12 request to serve additional discovery requests,
13 proper rebuttal testimony, and SBC's renewed
14 motion to strike.

15 I know that you have another issue that
16 you briefed, or you filed the other day, right,
17 another motion?

18 MR. MENKES: Yes.

19 And also we have a motion to strike
20 which will be fully briefed on Monday, and we
21 thought maybe we could discuss that schedule as
22 well.

1 JUDGE DOLAN: Okay.

2 MR. MENKES: In addition we have another
3 motion to strike which we filed relating to the
4 avoided cost study.

5 JUDGE DOLAN: That was the one I just received
6 yesterday?

7 MR. MENKES: Correct.

8 JUDGE DOLAN: That's not the one you're
9 talking about that is going to be fully briefed
10 on Monday?

11 MR. MENKES: No. The one that will be fully
12 briefed is a more general motion to strike that
13 was filed a few weeks ago.

14 JUDGE DOLAN: I'm having trouble keeping track
15 of all the motions going on.

16 Well, let's see, why don't we start with
17 the motion to compel and then we'll just kind
18 of -- we can discuss all the other matters going
19 along the way.

20 I did have an opportunity to read the
21 motion to compel and I also read SBC's response.
22 And on this one I think I do have to agree with

1 SBC that I think that the interrogatories were a
2 little too much with a little -- requesting a
3 little too much information, and as far as
4 relevancy goes, I myself do not feel that what
5 happens in any one of the SBC's other territories
6 besides Illinois is relevant to this proceeding.

7 I was involved in the SBC/AT&T
8 arbitration last spring. They tried to bring in
9 a lot of the other jurisdictions' informations,
10 but when it all was said and done a lot of it
11 didn't turn out to be relevant to this proceeding
12 whatsoall -- whatsoever because the different
13 states have different standards and, you know,
14 for this proceeding here, you know, what happens
15 in Oklahoma really isn't relevant to what happens
16 here in Illinois.

17 Since everyone seems to be talking the
18 Supreme Court rules when it comes to all the
19 interrogatories, the Supreme Court does limit
20 interrogatories to 30 questions including parts
21 thereof.

22 And, you know, obviously there can be

1 some supplements to interrogatories as far as
2 questions and responses but I think since we are
3 in such a tight time frame with this matter, I
4 think that there needs to be some scaling down of
5 your questions in trying to get more to the heart
6 of the matter of this particular arbitration
7 rather than what SBC does generally throughout
8 the country.

9 I mean, if you want to address my
10 comments, you know, feel free to.

11 MR. MENKES: Well, first of all, your Honor is
12 correct about the 30 interrogatories. There was
13 no objection.

14 But having said that, it strikes me that
15 a logical way to resolve it would be for UCS to
16 pick 30 of the interrogatories and designate
17 those that it would like answers to.

18 And the answers be given in short order
19 with the caveat that no answers need to be given
20 on an extraterritorial basis.

21 MR. BRANFMAN: This is Eric Branfman.

22 I think that does -- would be an

1 adequate method to dispose of the
2 interrogatories.

3 That does leave us with the question of
4 the document request to which SBC has also
5 objected. And there are, of course, are no
6 Supreme Court court rules limiting the number of
7 document requests.

8 JUDGE DOLAN: That is true.

9 But my experience in past dealing with
10 discovery has been that more often than not the
11 document requests should be relevant to the
12 questions being asked and not just generally, you
13 know, ask for every document that possibly could
14 be out there.

15 Again, you know, that's subject to, you
16 know, the issues of this arbitration, you know,
17 as long as the documents are relevant then I can
18 certainly see that it may be necessary for you to
19 obtain documents.

20 Now, if it's my understanding there was
21 what, 74 document requests?

22 MR. BRANFMAN: I think originally there was 74

1 but we have withdrawn some since then.

2 JUDGE DOLAN: I saw -- 72 interrogatories, 84
3 document requests and 28 requests to admit.

4 That was at least what I read in one of
5 the -- in your last filing -- was this the filing
6 of February 23rd?

7 MR. MENKES: Correct.

8 JUDGE DOLAN: That was your corrected motion
9 to compel, right, or was there another one?

10 MR. MENKES: It was a reply in support of a
11 motion to compel.

12 JUDGE DOLAN: On February 23rd.

13 MR. MENKES: Right.

14 JUDGE DOLAN: I'm seeing here that there's --
15 Mr. Branfman, is that how it's pronounced?

16 MR. BRANFMAN: Branfman. That's close enough,
17 your Honor.

18 JUDGE DOLAN: Excuse me. But I'm looking at
19 the Appendix B and it does show that there was
20 84 -- or 82.

21 MR. MENKES: Your Honor, there's gaps in
22 there.

1 There's missing numbers that were the
2 ones that were withdrawn. Those numbers refer to
3 the original numbers.

4 JUDGE DOLAN: Okay.

5 MR. MENKES: Your Honor, may I suggest that
6 maybe a way to resolve this is to allow UCS to
7 pick a certain number of those and ask responses
8 to them, again with the caveat that we don't get
9 extraterritorial information?

10 JUDGE DOLAN: Well, I certainly don't see that
11 as being unreasonable, but. . .

12 MS. O'BRIEN: Your Honor, I would just like to
13 add, I don't know that that necessarily addresses
14 some of the overbreadth issues.

15 I don't know which request that UCS has
16 in mind, but I think a lot of those, even
17 irrespective of the extraterritorial issues, a
18 lot of the requests are still extremely overbroad
19 and SBC Illinois, you know, put forth some what
20 we believe to be legitimate objections to those
21 responses.

22 JUDGE DOLAN: Okay. Well, I certainly

1 understand your position, counsel, and what I was
2 going to say is that if they're going to modify
3 their questions and tailor them more towards this
4 proceeding, I guess at this point until we see
5 what the questions are, it's kind of premature to
6 say that, you know, they could be irrelevant or,
7 you know, overly broad.

8 You know, we all are working on a very
9 short time frame. I mean --

10 MR. MENKES: We understand that, your Honor.

11 JUDGE DOLAN: -- the hearing is coming up in
12 what, three weeks.

13 MS. O'BRIEN: Three weeks.

14 MR. MENKES: Given that, your Honor, I would
15 ask that your Honor order that if there are
16 objections, first of all, they be made on a very
17 short deadline.

18 I would suggest -- we'll designate the
19 ones we really like the answers to by the end of
20 today and perhaps we can have objections within
21 two days, and I think it will be appropriate for
22 the Court to order that if there are objections

1 that we have a real 201(k) conference in which
2 SBC makes -- and both parties make a real attempt
3 to bridge the gap and discuss why things are
4 difficult to produce, if they are, and give UCS a
5 chance to explain why they need things and
6 hopefully avoid the Court's involvement.

7 MS. O'BRIEN: Your Honor, you know, in theory,
8 you know, we wouldn't have a problem with that
9 except for the fact, like you mentioned, the
10 hearing is coming up in three weeks.

11 SBC Illinois is in the process of
12 preparing its testimony. We're in the process of
13 responding to UCS's second motion to strike and
14 we're in the process of preparing our witnesses
15 and getting ready for the hearing.

16 To be quite frank, there's not a whole
17 lot of time to be engaging in additional
18 discovery conferences and the like.

19 MR. MENKES: Your Honor, we're in quite a
20 different position. We're trying to get ready
21 for trial, too, and we have no discovery.
22 Practically zero.

1 MR. BRANFMAN: We served this discovery, your
2 Honor, over three months ago and we gave SBC an
3 opportunity to meet with us in a 201 conference,
4 and they wouldn't talk about these requests one
5 by one as we offered to do.

6 MS. O'BRIEN: Well, now, at this point I think
7 it's probably -- we don't really need to get into
8 a debate.

9 SBC Illinois would obviously disagree
10 with that assessment -- with that
11 characterization of the 201(k) conference.

12 We did speak with the UCS on several
13 occasions and basically we came to an impasse
14 with respect to both parties' positions with
15 respect to the discovery.

16 And I may also add that SBC Illinois did
17 offer as a compromise to respond to 30 of UCS's
18 discovery requests, and UCS was not amenable to
19 that.

20 JUDGE DOLAN: Well, and I did see that in -- I
21 saw it was going to be 30 questions of SBC's
22 choosing, so I -- at least that's my

1 understanding.

2 Is that correct?

3 MS. O'BRIEN: Yes, that is correct.

4 JUDGE DOLAN: Okay. So that may or may not
5 have addressed the major issues that they really
6 feel need to be responded to.

7 But, you know, I think what we need to
8 do, though, is keep in mind because of the short
9 deadline and because everybody is scrambling, I
10 think that everybody needs to try to work
11 together as much as possible, and try to, you
12 know, work out some kind of compromise that
13 everyone can live with, because, you know, I
14 apologize for not addressing these sooner, but I
15 have been involved in a few major cases going on
16 at the Commission and, you know, it kind of
17 slipped through the cracks on my part.

18 So probably part of this is my fault for
19 not calling a status sooner or not being brought
20 to my attention sooner that we needed to get this
21 moving along.

22 But, again, I think what -- I would like

1 the parties to try to work at getting this
2 resolved as best as possible.

3 I mean, you know, as far as, you know,
4 again, until we see what the questions are going
5 to be and how difficult it is going to be for the
6 parties to respond to it, you know, having me
7 order you to do one thing or having someone else
8 do something else until we really know what's out
9 there, it's kind of tough to rule either way.

10 But I -- like I said, I think, you know,
11 given the short deadline and I know -- I realize
12 that everybody is trying to get ready for the
13 hearings and trying to get everything in order,
14 but on that same token, you know, I think we
15 should try to work together and try to make this
16 as smooth a process as possible.

17 So obviously the Commission rules do
18 state that if there is problems with discovery
19 that, you know, in the guise of 201, that, you
20 know, people should try to work together, try to
21 work out their differences before they bring it
22 to the Court's attention.

1 I mean, if you want, I could set this
2 for another status next week once you have had an
3 opportunity to propound your questions and SBC
4 has had an opportunity to review the questions,
5 and if we need to, we can discuss it further at
6 that point.

7 MR. MENKES: I think that would be
8 appropriate.

9 MR. BRANFMAN: Yes, your Honor.

10 I think it would be appropriate and I
11 don't think there's a need for further briefing.

12 We're not going to make up new questions
13 so, you know, the questions that exist have
14 already been fully briefed by both sides.

15 So if we still reach an impasse at that
16 point, I would think there would be no need for
17 further briefing. We have already stated our
18 positions.

19 MR. MENKES: Let me just say, your Honor, next
20 week is good with me if you are looking for
21 people's schedules, except Friday is not good and
22 I have a hearing at 2:00 o'clock on Thursday.

1 MS. O'BRIEN: I certainly will make myself
2 available for whatever.

3 JUDGE DOLAN: I'm -- actually next Friday is
4 not a good day for me, and, unfortunately,
5 Thursday morning I have three hearings already
6 scheduled.

7 So how about Wednesday afternoon? Would
8 that give everybody enough time to adequately --
9 I mean, it may not give you enough time to really
10 go through the questions, but I don't know what
11 else --

12 MS. O'BRIEN: I don't see why that would be a
13 problem.

14 MS. HERTEL: I think we could schedule it for
15 Wednesday and talk to your Honor after we have
16 had a chance to look at the questions.

17 JUDGE DOLAN: We can do like Wednesday at 2:00
18 o'clock, would that work for everybody?

19 MR. LANNON: That works for staff.

20 JUDGE DOLAN: Okay.

21 And now do we want to probably pursue --
22 I mean obviously your rebuttal testimony is going

1 to be based on what responses you get to the
2 interrogatories, right, whether you feel like you
3 need to address other issues in rebuttal
4 testimony, is that --

5 MR. BRANFMAN: Your Honor, I think it would
6 certainly be in part to make use of the
7 interrogatory answers and the documents that are
8 produced; but in addition we have other new
9 matters that SBC has raised that we didn't have
10 an opportunity to address in our original
11 testimony.

12 For example, they have submitted a cost
13 study which they have described as detailed and I
14 would certainly concur it is detailed.

15 And obviously we could not have
16 anticipated that they would file this cost study,
17 and we would certainly -- we're giving some
18 consideration to filing a rebuttal study if the
19 study is not stricken.

20 Our recent motion is to strike that
21 study but if it's not stricken, then I think the
22 only way we could respond to it would be to file

1 a rebuttal study.

2 They have also changed their position on
3 quite a few of the issues relevant to -- relative
4 to what it was when we filed our original
5 testimony and so we could not have anticipated
6 their new positions and their new arguments and
7 we would want an opportunity to address those new
8 arguments and demonstrate why in certain cases
9 those arguments are not well founded.

10 And they have also raised 15 new issues
11 that we had understood were not part of the
12 arbitration when we filed our testimony.

13 We would have known about this if they
14 had answered our discovery because we asked them
15 what their positions were on the various issues
16 but they didn't answer at that time and so we
17 weren't in a position to put that in our original
18 testimony.

19 So those are the areas in which we would
20 consider submitting rebuttal testimony if
21 permitted.

22 MS. O'BRIEN: Your Honor, if I could just

1 respond to that.

2 I think the Commission's rules are clear
3 with respect to what the supplemental testimony
4 entails and that entails a rebuttal to the
5 testimony that staff files.

6 The Commission's rules are clear on that
7 point and if the Commission doesn't adhere to
8 those rules you find yourself in a situation
9 where, you know, UCS can bring in new evidence
10 and SBC Illinois nor staff has a chance to
11 respond to it.

12 With respect to the issues being new,
13 SBC Illinois issues as being new that it raised
14 in its response, those issues are only new in the
15 sense that they were not raised in UCS's petition
16 for arbitration.

17 The subject matter of each of those
18 issues was on the table during negotiations. To
19 the extent, you know, SBC -- UCS could or could
20 not have -- they made the decision not to present
21 testimony or to raise those issues in its
22 petition for arbitration but that is not a basis

1 for allowing them now to come in and present new
2 evidence.

3 With respect to the cost study and SBC
4 Illinois's cost testimony, that is directly
5 responsive to UCS's -- UCS's issue that they
6 raised in their petition for arbitration
7 regarding the interim discount.

8 SBC Illinois obviously has the right to
9 present its own evidence with respect to that.

10 To the extent UCS is worried about not
11 being able to address those issues, they have
12 full opportunity to cross our cost witness at the
13 hearing. They do not need to put in supplemental
14 evidence on those issues.

15 MR. BRANFMAN: Your Honor, if I may respond.

16 I was just involved in a case before the
17 Florida Public Service Commission which held
18 exactly to the contrary with regard to a cost
19 study; said that although the Sprint cost study
20 that was submitted by the ILEC was very inferior
21 and had all sorts of deficiencies because the
22 CLEC had not submitted their own cost studies,

1 (inaudible).

2 We feel we do have (inaudible) need to
3 have the opportunity in fairness to address the
4 cost study under Rule 761.40 (a)(6), the Hearing
5 Examiner has the duty to ensure that the
6 arbitration is conducted in a full, fair and
7 impartial manner and we feel that if we are not
8 able to submit our own rebuttal study, that
9 that's very contrary to the way the Commission
10 has conducted any case in which SBC Illinois has
11 submitted a cost study.

12 The other side always has an opportunity
13 to submit a rebuttal. That's just good common
14 sense and fairness.

15 And in addition, we do take exception to
16 the suggestion of SBC Illinois counsel that these
17 issues were on the table prior to the
18 negotiation.

19 We disagree vehemently. They put in an
20 affidavit on that in connection with another
21 motion and we intend to put in a controverting
22 affidavit.

1 And in addition, I think that under SBC
2 Illinois's own argument, their own affidavit is
3 inadmissible.

4 They have argued in connection with
5 their motion to strike that evidence concerning
6 settlement negotiations is inadmissible, and then
7 they have gone and violated it by submitting an
8 affidavit which is exclusively devoted to
9 discussion of the settlement discussions and it's
10 not even firsthand evidence. A lot of that is
11 hearsay which they have also moved to strike our
12 testimony on.

13 So what's sauce for the goose is sauce
14 for the gander. And if that sort of -- SBC
15 Illinois wants to strike anything that violates
16 the so-called hearsay rule and the so-called rule
17 about not discussing settlement discussions, then
18 your Honor would have to strike this affidavit
19 and not consider it in determining whether these
20 issues were or were not on the table.

21 Thank you.

22 MS. O'BRIEN: If I could just respond to that.

1 First of all, you know, from my
2 understanding of the agenda today we're not here
3 to argue UCS's first motion to strike which is
4 the response to which Mr. Branfman is referring
5 to. We attached the affidavit of Ronald C. Hill.

6 Second of all, the affidavit of Ronald
7 Hill is not being entered in evidence in this
8 proceeding. It's not going to be evidentiary
9 record. SBC Illinois felt it necessary to
10 respond to UCS's motion with additional facts and
11 those facts had to be supported by an affidavit.
12 That's really all there is to that.

13 So any contention that we're somehow
14 going against our prior argument that evidence
15 concerning settlement negotiations is
16 inadmissible is just wrong.

17 We're not seeking necessarily to enter
18 that affidavit as evidence in the proceeding.

19 MR. MENKES: Your Honor, just so the point
20 that doesn't get lost here, what Mr. Branfman was
21 commenting about was UCS's belief that these 15
22 issues were not raised prior to the petition.

1 You'll be getting a brief on Monday
2 which I think will adequately demonstrate that
3 these issues are brand new issues.

4 MS. HERTEL: Could I request that we sort of
5 identify which motion we're talking about so we
6 see if it's sort of ripe to be arguing the merits
7 at this point.

8 It seems we're hearing about people's
9 briefs at this point on things that they're going
10 to be filing and perhaps just in the interest of
11 getting through this hearing we could just decide
12 if there's a schedule that needs to be set on a
13 couple of these and then go from there.

14 JUDGE DOLAN: Yeah, because that's what I'm
15 having difficulty keeping up with which motion
16 we're talking about here.

17 Now, this is the one that you just filed
18 the other day?

19 MR. MENKES: No. Well, I think we started,
20 your Honor, talking about one of the requests we
21 made in our motion which is the proper scope of
22 rebuttal testimony.

1 JUDGE DOLAN: Yes.

2 MR. MENKES: The conversation then got onto
3 are these 15 issues really new issues or not.

4 MR. BRANFMAN: That's where Ms. O'Brien
5 started referring to material from a different
6 motion.

7 MR. MENKES: Right.

8 JUDGE DOLAN: But now this March 15th filing,
9 this is -- strike the --

10 Well, I'm just saying this was the
11 motion that was filed on March 15th.

12 Now, you haven't responded -- SBC has
13 not responded to this motion?

14 MS. O'BRIEN: No, we have not responded to
15 that yet.

16 JUDGE DOLAN: Mr. Branfman, if you want to
17 comment, feel free.

18 MR. BRANFMAN: No. I have nothing further to
19 add at this point.

20 JUDGE DOLAN: Okay. Now, as far as just -- so
21 I can get it straight now the 15 new issues that
22 you're bringing up, were they responded to in

1 your response to the arbitration petition?

2 MS. O'BRIEN: They were -- they were raised in
3 our response to the petition of arbitration,
4 absolutely.

5 And the subject matter of virtually --
6 of 14 of those issues comes from SBC
7 Illinois's -- SBC's generic resale agreement
8 which always serves as SBC's baseline negotiating
9 positions in arbitrations or negotiations prior
10 to arbitrations.

11 And I think the point -- I think that
12 the point that I'm trying to make here is that,
13 you know, there is no basis for allowing UCS to
14 file additional testimony beyond the scope of
15 what staff filed.

16 Then we put, you know, like I said,
17 neither SBC Illinois nor staff will have a chance
18 to respond to that unless your Honor is willing
19 to add on additional rounds of rebuttal
20 testimony. And quite frankly, we just don't have
21 the time in the schedule for that.

22 UCS will have full opportunity to cross

1 SBC Illinois's witnesses at the hearing with
2 respect to cost -- all the cost testimony and
3 there's just no -- there's no need to file
4 additional supplemental testimony.

5 MR. BRANFMAN: Your Honor, we feel that the
6 opportunity to cross them and especially since
7 they have refused to provide any documentation
8 and claim we can't have any discovery on those
9 cost studies would be really a right that doesn't
10 exist.

11 We don't have any support for the study
12 and we wouldn't have a chance to rebut them.

13 Yes, we would have a chance to stand up
14 and ask questions, but that's not the kind of a
15 right that the Commission has recognized in prior
16 cost proceedings.

17 Prior cost proceedings we have the right
18 to take discovery of a cost study and we have the
19 right to file a rebuttal study.

20 What SBC is trying to do here is stall
21 and run out the clock and say no, there's no more
22 time for that.

1 But we're just talking about responding
2 to their study, and we're talking about
3 responding to issues that we believe and we're
4 going to submit evidence for were not raised
5 during the prepetition negotiations.

6 MS. O'BRIEN: If I just may add one thing.

7 Actually SBC Illinois's cost testimony
8 was in response to an issue that UCS raised in
9 its petition for arbitration, so there is no
10 question that that in any way could be a new
11 issue.

12 MR. BRANFMAN: Your Honor, it's not that it's
13 a new issue.

14 We did not propose that the Commission
15 attack the issue by the -- by reference to cost
16 studies.

17 We proposeed a different approach. SBC
18 is proposing a cost study approach and we feel if
19 the Commission is going to take the cost study
20 approach as SBC suggested, that fairness requires
21 that we have a chance to put in our own cost
22 study.

1 I don't believe the Commission has ever
2 based a cost decision on an SBC Illinois cost
3 study without allowing the other side the
4 opportunity to take discovery of that study and
5 to file their own competing study.

6 JUDGE DOLAN: Okay. Staff, do you have any
7 comments on this?

8 MR. LANNON: Well, only to the extent that
9 staff agrees, I think, with UCS and SBC that this
10 proceeding isn't the proper proceeding to set any
11 permanent avoided cost discounts for resale but
12 we should set interim rates here.

13 Now, I don't know if this cost study is
14 relevant to both permanent rates or -- and
15 interim rates. I guess I'd like that question
16 answered.

17 JUDGE DOLAN: Okay.

18 MR. LANNON: I haven't had the time to go into
19 the cost study at all.

20 JUDGE DOLAN: I haven't either, to be honest
21 with you.

22 So can you respond to his question?

1 MS. O'BRIEN: I think that UCS's petition
2 requests setting an interim rate so to that
3 extent the cost study is relevant to an interim
4 rate.

5 Is that correct?

6 MS. HERTEL: That's correct. And I think
7 there's also been some discussion and I believe
8 it's -- I believe it's in one of the versions of
9 the agreement that there would later be a
10 proceeding where permanent rates were determined,
11 a separate proceeding.

12 JUDGE DOLAN: Well, of course there would have
13 to be arising out of this, so...

14 MR. MENKES: Now, you do have -- the second
15 motion to strike that was filed was a motion to
16 strike the cost study testimony.

17 If that were granted that would make our
18 request partially moot.

19 JUDGE DOLAN: Okay. That's the motion you
20 just filed on March 15th?

21 MR. MENKES: Correct.

22 MR. BRANFMAN: But it wouldn't moot the part,

1 for example, about SBC making dramatic changes in
2 the positions that it's taken versus what it was
3 in prepetition.

4 So we didn't have an opportunity,
5 leaving aside the cost study, we didn't have an
6 opportunity to address their new positions that
7 they take in this arbitration at the time we
8 filed our testimony because at that point they
9 were taking different positions.

10 At that point they were saying they
11 wouldn't produce ICBs. Now they're saying they
12 will. And there are quite a few other issues as
13 well.

14 So we didn't have a fair opportunity to
15 address the positions that they're taking now.

16 We could only address the positions they
17 were taking then and that was a completely
18 different position.

19 MS. O'BRIEN: Well, again, your Honor, without
20 belaboring this point anymore, our 15 issues that
21 we raise in our response all deal with language
22 that came from SBC Illinois's generic resale

1 agreement.

2 That was available to UCS during the
3 prepetition negotiations. UCS could have raised
4 issues with respect to that language in its
5 petition. It didn't.

6 I'm not saying that it necessarily had
7 to, but it could have offered testimony on it.

8 MR. BRANFMAN: What I'm talking about, your
9 Honor, is the change of position on the 32 issues
10 that we raise.

11 SBC has dramatically changed its
12 position on many of those 32 issues.

13 We did address the issues. All we could
14 do was take aim at the position that SBC Illinois
15 was adopting at the time that we filed our
16 testimony.

17 And in many issues they didn't tell us
18 what their position was and on others they did
19 but changed it, so all we could do was fire at
20 the position that we understood at the time.

21 And now they have finally laid their
22 cards on the table in their testimony. They

1 chose not to lay the cards on the table in their
2 response.

3 They said for the first time out of the
4 13 responses they filed in this millenium that
5 that's not the proper thing to do even though
6 they have done it the last 12 times. They have
7 held out their positions until the testimony and
8 then they changed their positions.

9 So there was no opportunity for us to
10 demonstrate the fallacies in the positions as set
11 forth in their testimony because they didn't take
12 those positions until they filed their testimony.
13 They weren't available to us at the time we filed
14 our original testimony.

15 And I don't think it's fair, and as I
16 indicated before, the rules require that this
17 arbitration be conducted in a fair manner, to
18 preclude us from advising the Commission what our
19 views are on the positions that SBC is finally
20 taking in its testimony.

21 Those weren't available to us at the
22 time we filed our original testimony.

1 MS. O'BRIEN: Your Honor, if I could just make
2 one brief point.

3 Mr. Branfman says that, you know, we did
4 not set forth our positions in our response.

5 We filed along with our response a
6 revised redline contract document that sets forth
7 all of SBC Illinois's proposed language, that at
8 the bottom is our position regarding the
9 issues --

10 MR. BRANFMAN: Right, but that was filed after
11 we filed our testimony.

12 At the time we filed our testimony we
13 didn't have a chance to see that.

14 MS. O'BRIEN: Well, I believe you resubmitted
15 your testimony.

16 MR. BRANFMAN: I don't believe that it was --
17 we resubmitted the testimony because of an
18 alleged conflict of interest of Mr. Lambert.

19 I believe that if we had changed our
20 testimony radically to address all the issues
21 that were in SBC Illinois's redline, SBC would
22 have cried foul. And I don't think you can deny

1 that.

2 MS. O'BRIEN: Well, let me just add one thing
3 here.

4 Mr. Branfman is saying that we didn't
5 set forth our positions in the response, but yet
6 he's saying that he filed his testimony before we
7 filed our response, so even if we did set forth
8 our positions in the response, UCS --

9 MR. BRANFMAN: I would agree with that.

10 We simply did not have the positions
11 that SBC is espousing today when we filed our
12 testimony.

13 MS. O'BRIEN: Well, I mean, we respectfully
14 disagree with that, but I don't want to belabor
15 the issue anymore.

16 JUDGE DOLAN: Well, let me just -- on this
17 issue I am going to take it under advisement and
18 I'll try to make a ruling as quickly as possible
19 on it. I feel that I need to adequately research
20 it more thoroughly to make an intelligent and
21 informed decision on it. So for that one, I do
22 want to take some time.

1 If possible, I'll try to have it early
2 next week as soon as possible.

3 MR. BRANFMAN: Thank you, your Honor.

4 And I don't know whether you're
5 considering both the issue of our filing rebuttal
6 testimony and also the issue of our submitting
7 discovery with respect to the new issues and the
8 cost study.

9 We focused principally on the rebuttal
10 testimony but the two are closely related.

11 JUDGE DOLAN: Okay. Well, I would take a look
12 at both of them and try to rule on that in a
13 timely fashion.

14 MR. MENKES: Thank you, your Honor.

15 JUDGE DOLAN: And then finally the last issue
16 I'm showing up for today is SBC's renewed motion
17 to strike, I believe it's the testimony of --
18 that included Mr. -- that was taken out from Mr.
19 Lambert but --

20 MS. O'BRIEN: Yes. SBC Illinois would just
21 request that the ALJ set a date for decision on
22 that motion.

1 JUDGE DOLAN: Okay. I'll -- again, I will try
2 to get that one out. I should be able to get it
3 early next week.

4 MR. BRANFMAN: Your Honor, you know, we filed
5 the motion to strike also that will be fully
6 briefed by Monday and we feel the two should be
7 decided together because there are a number of
8 issues that are really common to them.

9 And so we think it would be helpful if
10 your Honor would look at both motions to strike
11 together and issue decisions on them together.

12 MS. O'BRIEN: Mr. Branfman, are you referring
13 to UCS's motion to strike and SBC Illinois's
14 motions to strike together when you talk about --

15 MR. BRANFMAN: Yes, because UCS's motion to
16 strike, the first one will be fully briefed on
17 Monday.

18 MS. O'BRIEN: Okay.

19 JUDGE DOLAN: I just want to make sure that --
20 that motion I do have, because that's not the one
21 you're talking about that was filed on the 15th,
22 correct?

1 MR. MENKES: Correct. We can messenger over a
2 copy to you this afternoon.

3 JUDGE DOLAN: So I just want to -- let me just
4 see if I do have it.

5 MR. BRANFMAN: That motion to strike was filed
6 on March 1st.

7 JUDGE DOLAN: Then I do have it. Motion to
8 strike and incorporate brief in support just
9 generally labeled.

10 Have you filed a response to this
11 motion?

12 MS. O'BRIEN: Yes, we have.

13 MR. BRANFMAN: Our reply brief will be filed
14 on Monday so it will be fully briefed.

15 JUDGE DOLAN: Okay. If possible I will try to
16 have a response to that by our status on
17 Wednesday.

18 Would that be acceptable to everybody?

19 MS. O'BRIEN: That's acceptable.

20 MR. BRANFMAN: Yes, your Honor.

21 And then there's the matter of our
22 second motion to strike that was filed on the

1 15th.

2 We feel it would be helpful to move this
3 along a little bit more rapidly because, again,
4 it ties -- it's a motion to strike the cost
5 study, SBC's cost study.

6 Assuming that we are permitted to file a
7 rebuttal study, we need to know whether the SBC
8 study will stand because if it stands then we
9 would intend to file a rebuttal study; if it does
10 not stand, then obviously we wouldn't want to pay
11 our expert to prepare a rebuttal study.

12 JUDGE DOLAN: Okay. Well, are you planning on
13 filing a response to that one?

14 MS. O'BRIEN: We will respond to it in the 14
15 days allowed by the Commission's rules.

16 MR. BRANFMAN: Your Honor, I was hoping that
17 we could shorten the time for the response and
18 for the reply briefs so that we could get a
19 ruling enough in advance of our April 8th
20 deadline for filing supplemental testimony to,
21 you know, to make a judgment on whether we need
22 to have a rebuttal witness at all.

1 Obviously if the motion to strike is
2 granted we won't have a rebuttal study.

3 And so the schedule that I thought would
4 be fair would be if your Honor could give us a
5 ruling by April 1st, that would be a week before
6 our April 8th testimony; and working backwards,
7 we could file a reply brief say six day days
8 before that, that would be March 26th, giving us
9 three days for a reply brief would mean that SBC
10 Illinois would file its opposition brief on the
11 23rd which would give them eight days for an
12 opposition brief.

13 MS. O'BRIEN: Your Honor, SBC Illinois wholly
14 objects to the request for an expedited briefing
15 schedule on the second motion to strike.

16 First of all, UCS could have requested
17 an expedited briefing schedule in its motion, in
18 its second motion. I think if you review that
19 motion you'll find that they didn't request an
20 expedited briefing schedule.

21 The second point is is that UCS could
22 have put the substance of its second motion to

1 strike in the first motion to strike. There was
2 nothing precluding them from doing that.

3 And in that case, that issue would have
4 been fully briefed by Monday and your Honor could
5 have issued a decision on it. The fact that they
6 delayed to file their second motion to strike,
7 SBC Illinois should not be prejudiced by that.

8 As you have noticed we are now going to
9 be working with UCS on discovery, in addition we
10 will be preparing our rebuttal testimony to
11 staff, in addition to that we will be preparing
12 for trial, and Mr. Branfman's proposed expedited
13 briefing schedule is simply just not acceptable.

14 MR. MENKES: Your Honor, if I may respond to
15 that.

16 The reason why the second motion to
17 strike wasn't made as part of the first motion to
18 strike was because it was triggered by the
19 staff's testimony when the staff questioned
20 whether it's appropriate to use an avoided cost
21 study in this sort of proceeding. It was filed
22 promptly after the staff's testimony was filed.

1 Second, this whole proceeding involves
2 short deadlines, your Honor, and we're going to
3 be forced to digest discovery and respond to it
4 and prepare our witnesss in just a few days.

5 I don't think it's asking too much for
6 SBC to do the same thing on this issue.

7 I think eight days is sufficient time to
8 respond.

9 MS. O'BRIEN: If I may just add, your Honor,
10 staff's testimony was filed on March 1st.

11 UCS did not file its second to motion to
12 strike until March 16th.

13 MR. BRANFMAN: March 15th.

14 JUDGE DOLAN: 15th, but still.

15 MS. O'BRIEN: Okay. Well --

16 JUDGE DOLAN: Any event.

17 MS. O'BRIEN: One day I don't think makes a
18 difference.

19 But the point is is that SBC Illinois
20 should not be prejudiced -- first of all, UCS
21 didn't even ask an expedited briefing schedule in
22 their motion.

1 Second of all, SBC Illinois should not
2 be prejudiced by having to respond on such a
3 tight turnaround.

4 JUDGE DOLAN: Well, counsel, as you know, we
5 are on a shorter deadline.

6 I would really hope that you would give
7 some kind of, you know, consideration that
8 everybody's schedule is very tight.

9 Obviously it's not that long of a
10 motion. I don't think you need 14 days to
11 completely respond to it.

12 I think we are all trying to, you know,
13 work together, get this resolved as best as
14 possible. Obviously the Commission rules do
15 allow you that time frame as a default schedule.

16 But I do feel that we should try to work
17 on something to get it done on a shorter time
18 period.

19 MS. O'BRIEN: Well then may I propose that we
20 be able to file our responsive brief by Friday?

21 MR. BRANFMAN: Your Honor, that's only one
22 business day shorter than the default rules

1 provide. That's not much of an accommodation.

2 MS. O'BRIEN: Actually, your Honor, that's not
3 true because we would have the weekend and the
4 following Monday as -- under the Commission's
5 rules our response would currently be due on
6 March 30th or March 29th.

7 MR. BRANFMAN: March 29th which is Monday so
8 from Friday, the 26th, to Monday, the 29th, is
9 one business day.

10 MS. O'BRIEN: Well, exactly. However, you
11 know, I work weekends and I do work on Saturdays
12 and Sundays and I do take those days into
13 consideration, and the attorneys with SBC
14 Illinois do as well.

15 So I think that if we were permitted to
16 file it on Friday, March 26th, that that would be
17 a reasonable compromise, particularly since UCS
18 did not request an expedited schedule in their
19 motion. They're requesting it here.

20 MR. BRANFMAN: Your Honor, I think that that's
21 not much of a compromise. I'll stand on my
22 assertion that that's one business day out of ten

1 business days that they had. That they're
2 willing to give back one of them. That's a 10
3 percent reduction.

4 MS. HERTEL: The rule doesn't go by business
5 days. It's calendar days.

6 JUDGE DOLAN: I understand.

7 Could you do it by noon on the 26th?

8 MS. O'BRIEN: Yes.

9 JUDGE DOLAN: I know that's not really giving
10 you a whole lot of time, but at least you'll see
11 it before the end of the business day on the
12 26th, Mr. Branfman.

13 Is that acceptable?

14 MR. BRANFMAN: Well, I guess really what we're
15 interested in is the end result and that depends
16 in part on how quickly your Honor is able to rule
17 after the matter is fully briefed.

18 So the schedule that I had suggested
19 would call for a ruling on April 1st which is one
20 week before our rebuttal testimony is due.

21 JUDGE DOLAN: How quickly can you get your
22 response to their reply done?

1 MR. BRANFMAN: I think if we got it on noon on
2 Friday, we could respond to it by Tuesday.

3 Does that make sense to you, Bruce?

4 MR. MENKES: Yes.

5 JUDGE DOLAN: Okay. Well, about all I can
6 tell you is that if you get it to me by Tuesday I
7 can try to, you know, have a response by the 1st,
8 but it would probably be -- have my ruling by the
9 1st but probably the 2nd at the very latest.

10 And that would still give -- you had the
11 8th as when you have to file your rebuttal?

12 MR. MENKES: Correct, your Honor.

13 JUDGE DOLAN: Okay. Well, I will try to
14 target the 1st, but I'll definitely -- I can
15 represent that I can have it done by the end of
16 the week.

17 MR. MENKES: I would appreciate that.

18 MS. O'BRIEN: So then we will file our
19 response on Friday, the 26th, by noon?

20 JUDGE DOLAN: Yes.

21 MS. O'BRIEN: Thank you, your Honor.

22 JUDGE DOLAN: Okay. Do we have anything else

1 to discuss today then?

2 MR. LANNON: Staff has nothing.

3 MS. O'BRIEN: We have nothing further.

4 MR. MENKES: One other housekeeping matter we
5 might raise, your Honor.

6 At the first hearing we had before you
7 we talked about the length we all expected the
8 trial to take. And we just want to state that it
9 is possible depending on what ends up getting
10 stricken and what ends up coming in that this
11 trial could take as long as three days.

12 JUDGE DOLAN: Okay. Well, that was one of the
13 reasons that I changed it to 10:00 o'clock in the
14 morning from the 2:00 o'clock on the 13th, just
15 because I figured we could do a full day on the
16 13th and I have actually left the rest of the
17 week open, just to be on the safe side.

18 MR. MENKES: Okay. Good.

19 JUDGE DOLAN: But I also have a trial starting
20 on the 19th that is scheduled to last probably
21 two weeks. It may not be the full two weeks but
22 hopefully we can get this done, you know, in

1 those three days just because the trial I have on
2 the 19th is going to be a long one.

3 MR. MENKES: Okay. Thank you.

4 JUDGE DOLAN: Okay. With that then we will be
5 entered and continued to March 24th at 2:00 p.m.

6 (Whereupon, further proceedings
7 in the above-entitled matter
8 were continued to March 24,
9 2004, at 2:00 p.m.)

10

11

12

13

14

15

16

17

18

19

20

21

22